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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KAMI TOWNS, Defendant and Appellant.	B172617 (Los Angeles County Super. Ct. No. BA220686)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tricia Ann Bigelow, Judge. Modified and affirmed.

Corinne S. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Adrian N. Tigmo, Deputy Attorneys General, for Plaintiff and Respondent.

Kami Towns appeals from the judgment entered following a jury trial resulting in his conviction of first degree murder and of second degree robbery, with findings of the personal discharge of a firearm proximately causing death and of a robbery-murder special circumstance. (Pen. Code, §§ 187, subd. (a), 211, 12022.53, subd. (d), 190.2, subd. (a)(17).)[1] Additionally, appellant admitted that he had two prior convictions within the meaning of the three strikes law. (§§ 667, subds. (b)-(i), 1170.12.) At sentencing, for the murder, the trial court imposed a life sentence without the possibility of parole (an LWOPP term), enhanced by a term of 25 years to life for the discharge of a firearm proximately causing death.[2]

Appellant contends (1) that giving the jury CALJIC No. 8.21.1, concerning the duration of robbery, was misleading and unconstitutional and warrants a reversal, and (2) that a parole revocation restitution fine is unauthorized when it is imposed in relation to an LWOPP term.

We find appellant's contention regarding a jury instruction to be meritless, and we modify the judgment to strike the parole revocation restitution fine and affirm the judgment.

THE FACTS

1. The Trial Evidence

A. The People's Case-in-chief

Viewed in accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that shortly before 1:30 p.m. on August 2, 2001, appellant and codefendant Frederick Grayson (Grayson) approached Eric

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] In an unrelated probation case, the trial court also imposed subordinate, determinate terms aggregating six years four months.

Williams (Williams).[3] Williams had parked his Cadillac on the west side of Poinsettia Place just north of Sunset Boulevard in Hollywood and was sitting in its driver's seat.

Eyewitness Gary B. walked out of the Ralphs Supermarket on that corner eastbound on the north side of Sunset Boulevard. He was returning to his car. A man quickly walked past him. As Gary B. crossed to the east side of Poinsettia Place at Sunset Boulevard, he glanced northward and saw the man who had rushed past him standing at the driver's side of Williams's Cadillac. At the same time, he saw another man on the passenger side of the Cadillac. The men were crouched down at the Cadillac's open front windows, as if they were speaking to its occupant. Gary B. speculated that a prostitute was inside the Cadillac, and the men were talking to her. Gary B. described the man on the driver's side of the Cadillac as having short hair or no hair. The man at the passenger window had a large bushy or frizzy hair style.

Suddenly, Gary B. and three other eyewitnesses heard gunshots, and they turned their full attention to Williams's Cadillac. By this time, Gary B. was on the east side of Poinsettia Place north of the Cadillac. He saw the men who had been "hovering" over the Cadillac running northbound on Poinsettia Place toward Hawthorn Avenue. The men were laughing and ran westbound into an alley. Moments later, Gary B. saw a car pull out in the alley.

David H. was standing at the light at Sunset Boulevard and Poinsettia Place. He heard the gunshots and looked north to the Cadillac. He saw two men standing near the sidewalk on the west side of Poinsettia Place. The men were just a few feet away and west of the Cadillac. David H. saw the man closest to the Cadillac discharge a firearm twice at the Cadillac, and the men ran.

Marco M. was in the parking lot behind the dry cleaners across the street and east of the Cadillac. He heard the gunshots and saw a man with bushy hair extending his arm

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[3] Appellant and his codefendant were tried during the same proceeding by the use of two juries. The appellate record fails to contain the verdicts of the Grayson jury. We have no record indicating that Grayson has filed an appeal.

toward the Cadillac; he saw no gun. For his safety, Marco M. immediately dropped to the ground. He saw the Cadillac pull away from the curb as the assailant with the outstretched arm discharged several more shots. During the shooting, in the background, he saw the gunman's companion running northbound. Marco M. heard the Cadillac's driver laugh heartily as the Cadillac pulled away from the curb, as if the driver felt triumphant about having thwarted whatever was going on at the Cadillac. After the gunman discharged his firearm, the two assailants ran northbound on Poinsettia Place. They were laughing.

Up the street, from his apartment window, Barry M. heard what could have been gunshots, and he saw two youths running northbound on Poinsettia Place. He said that the youths were laughing.

After the Cadillac pulled from the curb, Marco M. saw it stop momentarily in the middle of the street. Then the Cadillac pulled to the light at Sunset Boulevard and stopped. Marco M. ran to the Cadillac to render aid. Williams, the driver, was wounded. Before Marco M. could turn off the ignition, Williams convulsed and involuntarily hit the gas pedal, causing the Cadillac to cross Sunset Boulevard and crash into a Chinese Restaurant.

Two of the eyewitnesses called 911. Police units were dispatched. Minutes later, a Los Angeles Police Department detective and his partner approached westbound on Hawthorn Avenue. They saw a gray Buick Regal turn eastbound onto Hawthorn Avenue from northbound Poinsettia Place. The Buick drove eastbound at about 35 to 45 miles per hour to La Brea Avenue, where it quickly turned southbound.

The officers made a U-turn in their unmarked police car and followed the Buick. The detective and his partner were joined by marked police units in a pursuit of the Buick. During the pursuit, the detective observed appellant and Grayson occupying the Buick. Eventually, the pursuit came to a halt when appellant, the Buick's driver, crashed into a pole at the mouth of an alley near Delongpre and Highland Avenues.

After the collision, appellant ignored the police officers' orders to stop, and he escaped into the surrounding residential area. In the collision, Grayson's leg was broken,

and he remained inside the Buick. After the officers got Grayson out of the Buick, on the driver's floorboard, the officers found a nine-millimeter semi-automatic pistol with an empty magazine and chamber. Later, appellant's thumb print was discovered on the pistol's empty magazine. Next to the Buick's front wheel, in some bushes, the officers recovered a fully-loaded .25-caliber firearm.

The police officers set up a perimeter. Several hours later, they arrested appellant as he walked out of a security apartment building located inside the perimeter. Appellant had changed his clothing, and he was now wearing an ill-fitting black pants and shirt. The police officers discovered that appellant had removed his own clothing, donned a resident's clothing he found inside a dryer, and left his own blue jeans and white T-shirt, which were covered with his own blood, inside the dryer. Appellant had slicked down his full and frizzy hair and secured it in a pony tail so that his hair appeared less bushy.

After detaining appellant, the police held several one-man field identification procedures. The police officers in pursuit of the Buick and other bystanders who had seen appellant running into the residential area were certain that appellant was the driver of the Buick. A police officer identified Grayson as the Buick's passenger.

In his trial testimony, Gary B. made an in-court identification of appellant and Grayson. He said that about 12 hours after the shooting, he had identified appellant and Grayson in separate photographic identification procedures. He was not 100 percent certain of his identifications and explained that the photographs he had selected looked most similar to the assailants. In making his identifications, he mentioned that the men had several specific physical characteristics that matched the assailants'.

Marco M. and David H. attended field identification procedures for appellant, but they could not identify appellant, and Marco M. stated that appellant was not the assailant. However, when Marco M. and David H. saw Grayson at the hospital, each man separately concluded that Grayson looked similar to one of the assailants. David H. recalled that the gunman had been wearing a white T-shirt and dark pants.

A medical examiner testified that Williams had been shot four times in the upper torso. One bullet pierced his chest, lungs, and heart, and the resulting wound was fatal.

The police discovered that after the shooting, Williams had $1,348.25 and three credit cards on his person. He was wearing a gold Gucci necklace. On the Cadillac's right front floorboard, Detective Lloyd Parry found a gold, diamond-studded Statute of Liberty coin ring.

At the shooting scene, the police recovered four spent nine-millimeter cartridges, two on the Cadillac's floorboard and two near the sidewalk west of the Cadillac's former location on the west side of Poinsettia Place. A ballistics expert gave his opinion that the four spent cartridges were discharged from the nine-millimeter semi-automatic pistol recovered in the Buick. Other forensic evidence established that at least two of the bullets discharged from the nine-millimeter firearm had been fired through the open front passenger window of the Cadillac, that another bullet had shattered the glass in the Cadillac's rear window, and that a fourth bullet had struck a wheel well.

Williams's relatives and his best friend testified that Williams always wore a lot of flashy, gold nugget jewelry, particularly, a gold nugget identification bracelet and a Statue of Liberty coin ring, both of which were custom set with numerous diamonds. His friends and relatives said that daily, he wore his identification bracelet, his Gucci necklace, and his gold Statue of Liberty coin ring. Williams's best friend, Lenny "Geno" Branch (Branch), claimed that at 5:00 a.m. that morning, he was with Williams. Williams had been wearing his gold nugget identification bracelet, his gold Statue of Liberty coin ring, another square gold ring, a jade and gold nugget watch with a green face, the Gucci necklace, and a Statue of Liberty gold coin necklace that matched the recovered diamond-studded Statute of Liberty coin ring.

Williams's sister partially impeached Branch's testimony. She explained that Williams pawned his jewelry from time to time, and after Williams's death, she found Williams's gold nugget jade watch in a Las Vegas pawn shop.

After the Buick collided with the pole, paramedics treated Grayson for his broken leg. During treatment, Williams's gold nugget identification bracelet fell out of Grayson's left shoe.

The parties stipulated that appellant had 1991 and 2000 prior serious or violent felony convictions and that on August 2, 2001, he was on probation.

B. The Defense

Appellant did not testify on his own behalf.

In defense, appellant and Grayson called witness Charelle White, a former girlfriend of Williams. She testified that the last time she had seen Williams, which was about a month before the shooting, she could not recall whether he was wearing his gold nugget identification bracelet. She corroborated the other testimony that Williams occasionally pawned his jewelry and that well before his death, he had custom inset his gold nugget identification bracelet with diamonds.[4]

Detective Parry testified that during an interview early in the Williams's murder investigation, Williams's sister told him that a month before the murder, she had seen Williams. At that time, she told him that Williams's identification bracelet was not inset with diamonds. Also, soon after the shooting, Branch had told the detectives that on the early morning before the shooting, he was sure that Williams was wearing the gold nugget jade watch. The detective explained that at the field identification procedure of appellant, Marco M. said the following: "'I don't know if it's him. If he had a white shirt on, it may resemble him. I don't recognize the hair. I remember Afro-type frizz. I don't think it's him.'"

2. The Parties' Final Arguments

The prosecutor's theory at trial was that appellant and Grayson committed a robbery and a first degree felony murder based on the commission of robbery, or a robbery and a first degree deliberate and premeditated murder. He told the jury that the issues were whether appellant and Grayson were properly identified as the participants in

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[4] During the defense cross-examination, defense counsel implied that no one could be sure that Williams actually possessed the bracelet or any of his other jewelry during the shooting. Counsel also suggested that Williams's family and friends were mistaken or were deliberately misleading about whether Williams had added diamonds to the nugget identification bracelet prior to the shooting.

the robbery homicide, whether the shooting was committed for purposes of robbery, and whether appellant or Grayson was the person who had discharged the firearm. The prosecutor did not comment on after-acquired intent to commit robbery as it related to felony murder.

In defense counsel's final comments to the jury, he argued mistaken identification, that the firearms examiner's testimony that the nine-millimeter pistol was the murder weapon was unreliable because the examiner lacked experience and expertise, and that the People had failed to prove their highly circumstantial case beyond a reasonable doubt. More specifically, defense counsel asserted that none of the eyewitnesses were certain of the identifications of appellant and of Grayson and that there was nothing but unreliable circumstantial evidence connecting the occupants of the speeding gray Buick to the shooting. He argued that the evidence failed to prove beyond a reasonable doubt that the bracelet in Grayson's shoe belonged to Williams.

Defense counsel conceded that appellant was inside the Buick when it collided with the pole in the alley and that the nine-millimeter firearm was probably appellant's. Defense counsel argued that the evidence showed there was an equally plausible explanation for appellant's flight: appellant had prior convictions, and appellant was on probation. He urged that consequently, it was reasonable to assume that appellant was running from the police because he was an ex-felon who was illegally in possession of a firearm, and appellant was not running from the police because he committed the shooting. Counsel asserted that the prosecution had not proved beyond a reasonable doubt that appellant and Grayson were the persons who had committed the shooting.

DISCUSSION

1. Charging the Jury with CALJIC No. 8.21.1, Concerning the Duration of Robbery, was Not Misleading and Unconstitutional.

Appellant contends that certain language in CALJIC No. 8.21.1, concerning the duration of robbery, was misleading and unconstitutional and that the error entitles him to a reversal of the judgment. We disagree.

A. The Pertinent Facts

After the jury heard the trial evidence, the trial court instructed the jury as to reasonable doubt (CALJIC No. 2.90), as to the elements of first and second degree murder (CALJIC Nos. 8.10, 8.11, 8.20, 8.30, 8.31. 8.70 & 8.71), as to the elements of first degree felony murder based on an underlying offense of robbery (CALJIC No. 8.21), as to the elements of robbery (CALJIC Nos. 9.40, 9.41 & 9.43), as to the duration of robbery (CALJIC No. 8.21.1)[5], as to the requirements for aiding and abetting (CALJIC Nos. 3.00, 3.01 & 8.27), and generally, that there must be a concurrence of act and specific intent in order to find a defendant guilty of the charged offenses (CALJIC No. 3.31).

B. The Standard of Review

"If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Avena* (1996) 13 Cal.4th 394, 417.) '"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" [Citations.]' (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)" (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.)

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5 The trial court charged the jury with CALJIC No. 8.21.1, as follows: "For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is *not confined to a fixed place or limited period of time*. [¶] A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is in possession of the stolen property and fleeing in an attempt to escape. Likewise, it is still in progress so long as the immediate pursuers are attempting to capture the perpetrator or to regain the stolen property. [¶] A robbery is complete when the perpetrator has eluded any pursuers, has reached a place of temporary safety and is in unchallenged possession of the stolen property after having effected an escape with the property." (Italics added.)

C. The Relevant Principles of Felony Murder

Section 189 provides that any killing committed in the perpetration of specified felonies, including robbery**,** is first degree murder, whether the killing is intentional, or unintentional, or accidental. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197, 200.) Once a person perpetrates or attempts to perpetrate one of the enumerated offenses for first degree felony murder in section 189, then in the judgment of the Legislature, he is no longer entitled to the fine judicial calibration as to his intent, but he will be deemed guilty of first degree murder for any homicide committed in the course of the enumerated felony. (*Cavitt*, *supra*, at p. 197.)

To constitute robbery-based felony murder, the homicide must be committed by the killer *in the course of* the robbery. A robbery "'is not confined to a fixed *locus*, but is frequently spread over a considerable distance and varying periods of time. [Citations.] The assault of the victim, the seizure of his property and the robber's escape to a location of temporary safety are all phases in the commission of the crime of robbery linked not only by a proximity of time and distance, but a single-mindedness of the culprit's purpose as well.'" (*People v. Laursen* (1972) 8 Cal.3d 192, 199-200.) A killing is not felony murder unless it occurs as part of one continuous transaction with the robbery. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016, overruled on another point in *People v. Triplett* (1993) 16 Cal.App.4th 624, 627-629; see *People v. Cavitt, supra*, 33 Cal.4th at p. 193; *People v. Pulido* (1997) 15 Cal.4th 713, 723.) Felony murder is limited to those homicides where the killer's felonious intent is formed no later than the acts leading to death. (*People v. Pulido, supra*, 15 Cal.4th at 724, fn. 4; *People v. Ainsworth, supra*, 45 Cal.3d at p. 1016.) Liability for felony murder extends to killings committed by a robber during his or her flight from the scene of the crime and before the robbers reach a place of temporary safety. (*People v. Pulido, supra*, 15 Cal.4th at p. 723, fn. 3; *People v. Salas* (1972) 7 Cal.3d 812, 820-824.)

The mental state required for a first degree felony murder is simply the specific intent to commit the underlying felony. For robbery, the killer must intend to permanently deprive the victim of his property. (*People v. Green* (1980) 27 Cal.3d 1, 57,

overruled on other points in *People v. Martinez* (1999) 20 Cal.4th 225, 241, *People v. Triplett, supra*, 16 Cal.App.4th at pp. 628-629 & *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) The evidence must establish that the killer harbored the felonious intent either *prior to or during* the commission of the acts that resulted in the victim's death. (*People v. Cavitt, supra*, 33 Cal.4th at p. 200; *People v. Ainsworth, supra*, 45 Cal.3d at p. 1016; *People v. Green*, *supra,* 27 Cal.3d at pp. 52-53.)

D. The Analysis

Appellant argues that certain language in CALJIC No. 8.21.1 -- "*the commission of the crime of robbery is not confined to a fixed place or limited period of time*" -- in the context of the trial court's other jury instructions was ambiguous and misleading. He cites the principle from *People v. Bolden* (2002) 29 Cal.4th 515, 555-556, and *People v. Green*, *supra*, 27 Cal.3d at pp. 52-53, that to be guilty of robbery-based felony murder, the defendant must have the specific intent to permanently deprive the victim of his property *before or concurrently* with the application of force. In other words, a defendant cannot be found guilty of felony murder if he entertained only after-acquired intent. Appellant urges that giving the jury CALJIC No. 8.21.1 was error because it likely led the jury to find appellant guilty of felony murder based on after-acquired intent.

Appellant's argument fails.[6] The cases are legion that the jury is correctly instructed on the requisite intent for robbery-based felony murder when it is charged with CALJIC Nos. 8.21, 9.40, and 3.31. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 111-112; *People v. Hughes* (2002)27 Cal.4th 287, 359; *People v. Silva* (2001) 25 Cal.4th 345, 371; *People v. Hayes* (1990) 52 Cal.3d 577, 625-626; *People v. Hendricks* (1988) 44 Cal.3d 635, 643.) If appellant wished a clarifying jury instruction on after-acquired

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6 The People argue that the error is waived by trial counsel's failure to request a clarifying instruction. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140.) We agree. Nevertheless, an appellate court may review any instruction given without a request in the lower court if the substantial rights of the defendant are affected. (§§ 1259, 1469.) Since the error affects the defendant's substantial rights, we also consider the contention on the merits.

intent, he should have requested it. (*People v. Bolden, supra*, 29 Cal.4th at pp. 556-557 [it is incumbent upon a defendant to ask for amplifying instructions on after-acquired intent]; *People v. Kimble* (1988) 44 Cal.3d 480, 503 [sua sponte instructions are required as to the principles of law openly and closely related to the evidence; instructions amplifying an element of an offense are required only upon a request].)

CALJIC No. 8.21.1 is a correct statement of law. It defines when a robbery ends for the purposes of the felony murder rule. The instruction is relevant to the issues in the case because one theory of the evidence was that the killer shot Williams after, as well as before, asportation. Giving the jury CAJLIC No. 8.21.1 was necessary to impress upon the jurors that the robbery was still in progress even after the robbers had acquired the victim's property. (*People v. Carroll* (1970) 1 Cal.3d 581, 584-585 [killing occurring after victim momentarily had escaped and after the taking of the victim's wallet was part of one continuous transaction with the robbery and thus constituted felony murder].)

We have examined the language appellant complains of in CALJIC No. 8.21.1. In the context of that instruction and in the context of the jury instructions as a whole, we conclude that there is no ambiguity that would lead a reasonable juror to believe that after-acquired intent could be used to find appellant guilty of felony murder. The term "not confined to a fixed place or limited period of time" does not imply that there is no duration requirement for the robbery that is an element of the felony murder. Rather, the standard jury instructions for felony murder and CALJIC No. 8.21.1 make certain that the jury understands that there must be a concurrence of act and the specific intent required for felony murder (CALJIC No. 3.31) and that the robbery is ongoing until the robbers have reached a place of temporary safety (CALJIC No. 8.21.1).

Moreover, given the trial evidence in this case and the parties' arguments to the jury, the complained-of language in CALJIC No. 8.21.1 would not have misled the jury. The trial evidence supported conclusions that Williams's assailants engaged in only two courses of conduct: (1) the robbers approached the car to commit robbery, and then appellant shot Williams in furtherance of the robbery, or (2) appellant shot Williams for an unknown purpose unrelated to robbery, and after Williams was disabled, appellant and

Grayson took advantage of his disability to steal Williams's jewelry, after which appellant shot at Williams again as Williams drove off. Plainly, these two courses of conduct do not involve after-acquired intent. Notably, in the latter course of conduct, appellant had to have the specific intent for robbery because asportation was complete when appellant shot at Williams two more times, shattering the rear window of the Cadillac and hitting the Cadillac's wheel well. The shooting-asportation-shooting course of conduct supports only one finding -- that appellant had the intent necessary for robbery and for felony murder. (*People v. Bolden, supra,* 29 Cal.4th at p. 556 [formation of intent during the application of force constitutes robbery, not theft]; *People v. Seaton* (2001) 26 Cal.4th 598, 643-644 [a beating-robbery-beating scenario provides sufficient evidence of felony murder].)[7]

During final argument, the parties never mentioned after-acquired intent, indicating that the parties never considered after-acquired intent to be at issue. Defense counsel's argument implicitly conceded felony murder in order to make the strongest possible argument on mistaken identification.

Appellant cites *People v. Petznick* (2003) 114 Cal.App.4th 663, 681 in support of his claim. In *Petznick*, the reviewing court found the trial court's response to a jury question erroneously allowed the jury to find defendant guilty of conspiring to commit murder without a finding that he had entered into the conspiracy with the specific intent to kill. (*People v. Petznick, supra*, 114 Cal.App.4th at pp. 680-681.) The court reversed

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[7] Appellant's contention does not raise the issues of complicity in felony murder that are addressed by the recent decisions in *People v. Cavitt*, *supra*, 33 Cal.4th 187 and *People v. Pulido*, *supra*, 15 Cal.4th 624. Appellant's contention implicitly assumes that appellant was the killer, not the aider and abettor, and that there was no factual issue presented regarding appellant's role as a late-joining accomplice to the robbery. For an aider and abettor to be guilty of felony murder, the common design to commit the felony must exist when the acts leading to the slaying occur. Here, the trial court gave the proper instructions defining the requirements for aiding and abetting felony murder -- it charged the jury that the aider and abettor must be jointly engaged in the robbery at the time of the killing to be liable for felony murder. (*People v. Pulido*, *supra*, 15 Cal.4th at pp. 722-724 & fn. 4.)

the judgment because the jury's concern went right to the heart of the defense. (*Id*. at pp. 682-683.) *Petznick* is of no assistance to appellant because appellant's contention does not involve principles of complicity.

He also cites *People v. Esquivel* (1994) 28 Cal.App.4th 1386 (*Esquivel*), where the defendant was prosecuted as an aider and abettor to a robbery-based felony murder. In *Esquivel*, there was evidence that appellant was present while two men murdered a female friend of his. Items belonging to the woman were later found at the defendant's residence. The defendant told the police that he was present during the murder but so afraid of the two killers that he did not stop the killing and that the other men gave him the stolen property after the murder for safekeeping. (*Id*. at pp. 1390-1392.) The trial court instructed the jury with the standard instructions on felony murder based on robbery and as to the liability of an aider and abettor. (*Id*. at p. 1393.) On appeal, the defendant complained that the felony murder doctrine does not apply unless the jury found that the defendant formed the intent to participate in the robbery before the victim was killed. Because the trial court should have instructed the jury specifically on that point, the reviewing court agreed with the defendant's contention, and it reversed the judgment. (*Id*. at pp. 1396-1400.)

The decision in *Esquivel* also fails to support appellant's contention. Again, appellant's complaint is not about the requirements for complicity in a felony murder. The jury here was given the instruction on the liability of an aider and abettor for felony murder that was missing in *Esquivel* -- the jury was told in CALJIC No. 8.27 that the aider and abettor must be jointly engaged in the commission of the robbery with the killer at the time the fatal wound is inflicted. The decision in *Esquivel, supra,* 28 Cal.App.4th 1386, does not address whether CALJIC No. 8.21.1 conflicts with the other standard jury instructions on the intent required for felony murder or any other issue having to do with the killer's responsibility for felony murder. The requirements for liability for felony murder as an aider and abettor are different than the requirements for liability by the killer. (See *People v. Pulido, supra*, 15 Cal.4th at pp. 716-720.)

2. The Section 1202.45 Parole Revocation Restitution Fine Was Improperly Imposed with the LWOPP Term.

During sentencing, the trial court imposed a $5,000 section 1202.4 restitution fine and a $5,000 section 1202.45 parole revocation restitution fine. Appellant contends that the latter parole revocation restitution fine must be stricken from the judgment. The People concede the contention, and we agree. The section 1202.45 parole revocation restitution fine applies only in the event that a defendant will be statutorily eligible for parole after his prison term is completed. Here, the trial court imposed an LWOPP term, and appellant will not be paroled. Accordingly, because the latter fine applies only where a defendant will be recommitted to prison following revocation of his parole, the section 1202.45 parole revocation restitution fine is unauthorized. (*People v. Andrade* (2002) 100 Cal.App.4th 351, 355; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.)

We modify the judgment by striking the unauthorized section 1202.45 parole revocation restitution fine and affirm the judgment.

DISPOSITION

The judgment is modified by striking the unauthorized section 1202.45 parole revocation restitution fine. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, P. J.

BOREN

_____, J.

DOI TODD